A subscription to stock is a contract between the subscriber and the company, governed by the same rules of honesty and fairness in its enforcement that apply to ordinary contracts: *Railroad Company*, v. *Byers*, 8 Casey, 22; *P. and C. Railroad Company* v. *Graham*, 12 Casey, 77.

We think there was error, also, in taking from the jury the decision of the fact whether the meeting of October 18th, was in 1865 or 1866. The entry bore date in 1866, and, if this was a mistake, it was for the jury to find it.

We are of opinion, also, that the interest of five per cent. a month on the subscription, payable after a failure for thirty days to pay the call, is a *penalty*, and not merely interest in the ordinary sense of the term. It is called interest in the act, but its obvious purpose, and the amount (being at the rate of sixty per cent. per annum) is for the enforcement of payment by way of a penalty. The act says as much as that the company may enforce payment, either by forfeiture of the stock itself, or by a penalty of five per cent. a month for delay.

Judgment reversed, and a *venire de novo* awarded.

Supreme Court of Mississippi.

NAPOLEON B. STREET *v.* THE STATE OF MISSISSIPPI.

It is well settled that before the acts and declarations of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy *aliunde*.

But a conspiracy may be proved like other controverted facts, by the acts of parties or by circumstances, as well as their agreement.

Bail is never allowed in capital cases, where the proof is evident and the presumption great: *In re Bennoit*, 1 La., 142, cited and approved.

An indictment for murder furnishes no presumption against the accused at his trial, but as regards all intermediate proceedings between indictment and trial, it furnishes the strongest possible presumption of guilt.

When the return shows that the accused was arrested on a bench warrant upon an indictment for murder, the "detention" is legal; in such cases, instead of stating in the petition for *habeas corpus* that the imprisonment is illegal, it should claim that the prisoner is entitled to bail.

The jurisdiction of Supreme Court to grant bail in cases brought up on writ of error, is purely revisory and correctional. The judgment of the judge below must be regarded as presumptively right till error is shown.

Upon questions of bail, this court approves the rule (laid down in 1 Ashmead, 234, and 19 Ohio, 141), to refuse bail in a case of malicious homicide where the judge would sustain a capital conviction by a jury on evidence of guilt, such as that produced on the application for bail, and to allow bail when the prosecutor's evidence was of less efficiency.

This was a writ of error to the Circuit Court of Yazoo county. The plaintiff in error was arrested by the sheriff, and sued out a writ of *habeas corpus,* on which the sheriff returned that he held the relator in custody under arrest by bench warrant, to answer an indictment for murder.

The defendant rested his case, and moved for discharge upon or without bail; but the court refused to discharge or bail, which was assigned for error in this court.

The indictment was then read, and the testimony of the witnesses taken. During the trial several questions as to competency of testimony were made, to the effect that the declarations and statement of David Roach, the actual perpetrator of the homicide, were not admissible in evidence against the relator, because there had not been proof made that the relator had conspired and confederated with Roach to kill the deceased.

The opinion of the court was delivered by

SIMRALL, J.—The return of the sheriff not being controverted, as might have been done under Article 11 of Habeas Corpus Act, it showed sufficient authority to hold the prisoner in custody.

In this case the declarations objected to were made in the presence and hearing of the relator—some of them addressed to him—and are, therefore, relieved of the objection made by counsel, and were competent on other grounds altogether, as tending, with other things, to make out the conspiracy.

That the judgment which we render in this case may be the better understood, we will attempt to state the principles of the law of bail as at common law in England and the United States, and as modified by our constitution and statutes. By the early English common law, bail seems to have been a matter of discretion with all judicial magistrates and courts before whom offenders might be brought. By the ancient statute of

Westminster I, c., 13, the power to bail, as to the inferior courts and magistrates, was regulated and restricted; but the Court of King's Bench and its judges were left unaffected by this statute in possession of full common law jurisdiction. The celebrated Habeas Corpus Act of Charles II, conferred the power to bail on the judges of the superior courts of Westminster Hall, and other superior judges. In those states of the Union which have derived their jurisprudence from the English source, this common law jurisdiction has been held to pertain to the superior courts, and has been very generally delegated by statute to the judges of the higher courts. The primary objects of the great writ of *habeas corpus* was to deliver persons restrained of their liberty without any or sufficient legal cause and authority; therefore, the return was required to set forth in the fullest manner, the caption, its date and the cause or authority of the detention, and the court or judge, according to the circumstances of the case, either discharged, bailed, or remanded. The Court of King's Bench and the judges authorized to hear and determine a case on *habeas corpus* have, according to the principles of the common law, the power and discretion to bail all persons whatsoever, and for all offences whatsoever, without regard to the degree of their crime, or the nature of their punishment. Their power to bail in a capital case was as unquestioned as when the punishment did not reach to the life of the accused. The power and the discretion being thus extensive, and its exercise discretionary, it is important to look to the practice and the principles on which the courts and judges proceeded. The rule as laid down by Hawkins, B. 2., chap. 15, s. 20 and 80, is, "that persons convicted of felony, or who have confessed their guilt, or are notoriously guilty of treason or manslaughter, by their own confession or otherwise, are not to be admitted to bail without some special motive to induce the court to grant it, for bail is only proper where it stands indifferent whether the party is guilty or innocent of the accusation against him, as it often does before the trial; but when that indifference is removed it would be absurd to bail."

In *Rex* v. *Wyer*, 2 T. R., 77, the application to bail was on

the ground that the offence imputed was not a felony; but the court being of the opinion that it was a felony, bail was refused. So in *Rex* v. *Marks*, 3 East 163, it appearing from the depositions taken before the coroner's jury that the crime charged was felony, the prisoner was remanded.

The court refuses to receive extrinsic evidence, confining itself to the return, and the depositions before the committing magistrate or the coroner. If the return be legally sufficient, the court cannot try the fact on affidavit, nor can the return be pleaded to, nor can an issue be made upon it: 1 Bacon Abr. title Bail, 589; 4 T. R., 757; 4 Burr, 2539; 1 Chitt. Crim. Law; 1 Haw., P. C., chap. 19.

In *Tayloe's case*, 5 Cowen, 39, the relator was under indictment for manslaughter, which was not a capital felony. The Supreme Court of New York had the same discretionary power to bail as the King's Bench in England. The three judges delivered their opinions *seriatim*, and the subject of bail as to the power, the right, and the practice, was very thoroughly considered on the authorities. The conclusion reached was, that in felonies bail would not be granted before indictment, unless in special circumstances; among others, the probable innocence of the accused; and such was stated to be the practice from a review of the decisions and accredited text writers. After indictment the accused ought not to be bailed. The finding of the grand jury is taken as furnishing a strong presumption or probability of guilt. Other considerations will influence the discretion of the court, as when the prosecution has been unreasonably delayed, or the life of the person is endangered by some distemper, or sickness threatening life has been induced by the confinement: 1 Bacon Abr. 589.

The right to bail, as it stood at common law, was considered by our predecessors in the case of *Ex parte Dyson*, 25 Miss., 359. In the very sound and judicious opinion of the court, after stating that the constitutional provision, Art. 1, Sect. 17, only applied to bail before conviction, and that after conviction the right of the prisoner remained as at common law, whilst declaring the power as plenary, it added: "Whilst the power is admitted, it should be exercised with great caution, and

only when the peculiar circumstances of the case render it right and proper." "The court is governed entirely by a sound judicial motive to induce the court to grant bail." Dyson had been convicted of a felony not capital, and his case was pending in the high court waiting a reargument.

Under the Habeas Corpus Act of Charles II, the judges would not look into testimony *aliunde,* but regarded the finding of the grand jury as conclusive upon them.

The writ of *habeas corpus* is in nature of a writ of error, to examine into the legality of the imprisonment, and, therefore, it commands the caption and cause of detention to be returned. If the relator was in custody by commitment of a justice of the peace or other inferior magistrate, the custom was to send with the writ a certiorari to send up the depositions on which the commitment was predicated. If there was no pretence of imputing to the prisoner an indictable offence, he will be discharged. But it is more usual to bail or remand according to the nature of the charge: 1 Chitt. Crim. Law, 111, 128.

As already stated, the King's Bench, and its judges, have power to bail for any offence whatever before or after conviction. But this is not a wild, irresponsible discretion, left to the caprice or individual judgment of each judge; but a legal discretion, regulated by the rules and practice as contained and expounded in the adjudged cases 1 Chit. Crim. L. 128. As said by Chief Justice MARSHALL: "regulated according to the usage of law."

In the *case of Bennoit,* 1 Martin La. Rep. 142, the prisoner had been indicted for an assault with intent to kill and murder—then a capital offence. In response to a motion to let to bail, the court said: "Bail is never allowed in offences punishable with death, where the proof is evident, and the presumption great."

On a coroner's inquest finding a party guilty of murder, the judges have often looked into the testimony which the coroner is bound to record, and when they have been of opinion that the jury have drawn an illogical conclusion, admitted the party to bail. "But the judges can not help considering the finding of the grand jury as too great a presumption of the defendant's guilt to bail him."

In *Burr's case*, (by Robinson 1, 301-308.) after indictment, application was made for bail. MARSHALL, C. J., after considerable discussion said: "The Act of Congress in express terms enabled the court to bail a person arrested for treason. There was no distinction between treason and other criminal cases, as to the power to bail upon arrests; but an arrest might be after the finding of the grand jury, in which case the finding of the grand jury would be the evidence of which the court would have to judge whether the party arrested ought to be bailed. They were to exercise their discretion according to the nature and circumstances of the offence, and of the evidence, and *usages of the law.* The usages of law were to be found in the common law and the practice of the courts." But he "doubted extremely whether the court had the right to bail after indictment for treason." Mr. Burr and Luther Martin asked for time to search for precedents. No authorities were produced by them, and bail was denied.

In *McLeod's case*, 25 Wend. 483, the prisoner was indicted for murder; bail was refused; the court declining to receive proof of an alibi by the relator, at the time of the murder.

C. J. RAYMOND, in *Rex* v. *Dalton*, 2 Str., 911, thought the indictment conclusive.

In *State* v. *Miller*, 2 Dev. N. C., 421, RUFFIN, J. said: "After indictment found a defendant is presumed guilty for most, if not all, purposes, except that of a fair and impartial trial before a jury. This presumption is so strong, that in a capital felony the party can not be let to bail."

In *Hight* v. *United States*, 1 Morris (Iowa) Rep., 407, in commenting on the effect of an indictment, under a statute forbidding bail, in a capital case, "where the presumption is great, or the proof evident," the court said: "An indictment furnishes no presumption, when upon trial, but so far as regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt. The finding of the grand jury is conclusive so far as to control proceedings up to the time of trial. The humanity of our law requires, before a person shall be punished as a criminal, he must be found guilty by two independent juries. The verdict

of the first raises a full presumption of guilt up to the time of trial before the second."

We will now examine the modifications made by positive law in this state:

The 10th Art. of Habeas Corpus Act, Code 366, directs the judge to proceed to enquire into the cause of imprisonment or detention, and he may either discharge, bail, or remand, as the law and the evidence may require.

The return shall not be conclusive as to the facts therein stated, but evidence may be received to contradict the same.

The return in this case is that the prisoner is held to answer an indictment for murder. We have seen that at the common law, on such returns made to the court of King's Bench, or to an American court of superior common law jurisdiction, although their right to bail, in any case, and for any offence, without regard to the degree of the crime, or the severity of the punishment, was plenary, yet the "usages of the law" had so shaped and regulated the discretion of the courts that, generally, bail was denied after indictment for a felony which was not capitally punished; and that in capital cases the motive or reason for bail must arise in point of time after indictment, such as the delay by the prosecution to bring on the trial, the danger to the life of the accused by the imprisonment, &c., &c.

At common law the return of the sheriff on the writ could not be disputed, and the court looked to that to judge of the rightfulness of the detention.

By the 11th Art. of our act, the return may be disputed by evidence. Again, the judge before whom the prisoner is brought shall impartially proceed and dispose of the case according to the law and the evidence, and may summon witnesses, &c.

The writ "extends to all cases of illegal confinement or detention whatever." Its primary object is to deliver from "illegal confinement." Where the return shows, as in this case, that the prisoner was arrested by a bench warrant, which commanded the sheriff to "take and safely keep the relator," to answer an indictment for murder, the "detention" was perfectly legal. Where the prisoner is in confinement, charged by indictment with a capital felony, his petition for the writ,

instead of stating, as in this case, that his imprisonment is illegal and without warrant of law, ought to claim that he is entitled to be enlarged on bail, under the section in the Bill of Rights; for no one would pretend that the judge can discharge, even on the clearest proof of *innocence*.

The practice of the courts and judges under the Habeas Corpus Act of Charles II., and of the American courts and judges, where the common law was not modified, was to remand to custody, where the return showed that the prisoner was under indictment for a capital crime, and they would not hear affidavits of witnesses in exculpation.

The 8th section of the Bill of Rights introduces a material modification. It makes bailable all crimes (which the common law did not, as a matter of right), "except capital offences, where the proof is evident or the presumption great."

In *Davis' case*, 6 How. Miss., 399, it was remarked by the court, "It is believed that the clause of the Constitution was intended by its framers for the better security of the citizen against an improper exercise of discretion with which the common law clothed the judges, and to take from them all discretion whatever before conviction—only when it becomes necessary to discriminate between capital and minor offences—"leaving the discretion after conviction as at common law."

Under the Bill of Rights, bail before conviction is a matter of right (and not of discretion) for all offences, except those that are capital, "where the proof is evident or presumption great."

Perhaps the original of the section in our Bill of Rights, and in the constitutions of nearly all the states, is a clause in the Ordinance of 1787 for the government of the territory northwest of the river Ohio. This ordinance was mainly prepared by Mr. Jefferson, it is said. The words of the ordinance are: "All persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great." As that territory was formed into states, this provision in the ordinance was, in terms or with slight modifications, incorporated into their constitutions—and for many years has held a place in the constitution or statutes of nearly all the states. In 1845, the

Supreme Court of Iowa passed on the effect of the ordinance, which had been incorporated into their constitution. It was contended in the *case of Hight* (1 Morris Rep. 407)—who was under indictment for murder—that "liberty be given him to prove and satisfy the court that the charge in the indictment was not based 'upon proof that was evident and presumption great,' and therefore he should be let to bail." For the state it was contended that "the indictment furnishes such proof in presumption, and that evidence behind the indictment ought not to be received." It was held by the court that the indictment was conclusive that no evidence ought to be received, and the application was overruled. The Chief Justice said: "This is no new provision, but is in express terms incorporated into the constitutions of at least half the states, and is the rule of action in all the rest. If the construction contended for be correct, it is a little remarkable that no case can be found where a similar application has been successfully made."

The Bill of Rights, and the statute of our state, are not broader or more liberal than in the other states. The right continues until conviction.

Until the decision in *Wrays' case*, 30 Miss. Rep., 673, the practice in this state is believed not to have been uniform. In some of the circuits the judges held the indictment for a capital felony as raising conclusively the "presumption great," and declined to examine witnesses.

Since *Wrays' case*, the practice has become uniform, and evidence *aliunde* the indictment is received, and this has been considered as settled. On the hearing of the *habeas corpus* is the indictment placed entirely out of consideration? If so, it becomes a question of guilty, or not guilty, on the evidence. Yet it is quite certain that is not the issue—for it were absurd to say that the judge could discharge, however clear the proof of innocence might be. Nor is it in any sense a revision, or revisal of the grounds of the action of the grand jury, for the judge cannot revise their finding, or put the party on final trial for a less grade of crime.

On the hearing in this case the issue submitted to the judge was—"Is the presumption great, or the proof evident that the

prisoner is guilty of a capital crime?" The indictment and the testimony were all to be considered, in forming a judgment.

When closely reflected on, very serious embarrassments attend the decision of a case, brought from the judgment of the circuit judge, where the case turns mainly on the testimony. We feel it sensibly in this case. Nearly every case that we have examined in the English and American books (except those in this state) were *original* applications for bail. In nearly all of them where the point was referred to at all, the judges declined to go into an analysis of the evidence, to determine as to guilt or innocence. That, say they, "is the province of the jury."

Any discussion we might make, or any opinion we might come to on that subject, might have an injurious effect on the jury trial. "So much depends on the manner of witnesses, their seeming bias or fairness, that cannot be brought before this court but which should yet have a material bearing on the weight of evidence," that we would pause long before we would disturb the decisions of the circuit judge where the weight of the evidence depended on the credibility of witnesses—for he had far, very far, better means of detecting the false, biassed, prevaricating witness, than this court—means indeed, which by the secondary channel of a bill of exceptions cannot be brought before this court.

We are exercising over this writ of error a purely revisory, correctional jurisdiction. We have no larger jurisdiction, or discretion to bail,—where a case is before us on a writ of error—than the judge or court, whose judgment is before us. Indeed, there is nothing in the law to warrant us in dealing with such a case, in any sense exceptional. We must regard this judgment as presumptively right, until error is shown.

It appears in this case that the witnesses were, in important particulars, conflicting, if not contradictory; that necessarily the question of credibility arose—and assuming that question as settled in the mind of the judge in one way—there are very strong inculpating facts. Touching these matters, the circuit judge had far better opportunities, and was in more favorable circumstances to come to a safe, reliable and just opinion, than this court. The grand jury who had the advantage of a personal

examination of the witnesses, *exparte* to be sure, have charged the party with murder. The circuit judge, with the like examination of such witnesses as were brought before him, has denied bail.

The facts in the record do not raise the question of the degree of the crime—murder or manslaughter. On that subject there can be no doubt. And as manslaughter is included in an indictment for murder—and a conviction of the lesser offence can be sustained under a charge of the greater—there might be great propriety in this court looking at testimony with the view of ascertaining what grade of the crime the evidence fixes.

We suppose the main object of allowing a review at all, was to correct the errors of law which might materially prejudice the relator, rather than to estimate and criticise the testimony as to its weight and criminating effects. If the circuit judge excludes the testimony material to the defence; if he has clearly mistaken the grade of the felonious homicide to the disadvantage of the prisoner; if he holds a party restrained by arbitrary power, or by private force, or by the sentence or act of a tribunal without jurisdiction; or if he refuses bail on testimony too weak to raise "great presumption or evident proof;" for the correction of such errors as these, the revisory powers of this court were, in our view, mainly conferred.

What is meant by the words "proof evident or presumption great?" The judges, as the authorities which we have examined showed, were accustomed to look at the depositions before the coroner, or magistrate, to see whether there was probably felony committed by the accused. If he was clearly innocent, they discharged, but if strongly inculpated, they generally refused bail.

After indictment, however, they declined altogether any examination into the *corpus delicti*, accepting the finding of the indictment as strong probability of guilt.

Therefore, in *Burr's case*, after indictment, bail was denied; therefore, in *Bennoit's case*, the Supreme Court of Louisiana declared that the indictment raised the "presumption great;" therefore, in *Hight's case*, the Supreme Court of Iowa attached the same effect to the indictment. It was because the probability of guilt was heightened by indictment beyond what it

was, by the mittimus of a justice of the peace, that bail was denied in *Tayloe's case,* and in *McLeod's case,* 25 Wend.

If on the hearing of this case, neither the prosecution nor defence had offered testimony, what would have been the duty of the judge—bail or remand? To discharge was absurd and impossible. There can be hardly a doubt that this prisoner must be remanded; for the reason that the matter of the return creates the "presumption great" meant by the Bill of Rights. The return contained ample authority to hold the relator in custody, unless its force were broken; the *prima facie* case is made, to be overcome by the testimony.

We are not left entirely to the results of our own reflections on this point. There is much force in the words of the Pennsylvania Court, in the case of *Commonwealth* v. *Keeper of Prison,* 1 Ashmead, 234. The Pennsylvania Constitution contained precisely the provisions of the section of our Bill of Rights: "All prisoners shall be bailable, unless for capital felonies, where the proof is evident or the presumption great." The judge said: "Assuming murder in the second degree to be a bailable offence, yet the power to discriminate and decide upon the degrees of murder pertains to the jury which tries the offence, and is not properly exercisable by the judge, on a question of admitting to bail. In a given case, where a malicious homicide should be clearly shown, and in which the presumption was necessarily strong to take away life, I should pause before I would undertake to decide as to what degree of murder the perpetrator was guilty in such an inquiry as that before me. It is difficult to lay down any precise rule for judicial government in such a case; but it would seem a safe one to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction pronounced by a jury on evidence of guilt such as that produced on the application for bail, and to allow bail where the prosecutor's evidence was of less efficiency. This affords a practical test by which the granting or refusing bail may be readily solved."

These rules are referred to with approbation by the Supreme Court of Ohio, in case of *State* v. *Summons,* 19 Ohio Rep.,

141; and the court proceeds: "So with us in Ohio, if the evidence exhibited on hearing of the application to commit be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will feel it their duty, under the constitution, to bail the prisoner." The article in the Ohio Constitution is precisely like ours. In this case there had been a disagreement of the jury on one trial, and that circumstance was an element in the case. If the testimony should make the impression on our minds that the petit jury might and ought to convict, on the same testimony, we would not hesitate to declare that the circuit judge did not err in declining bail.

In *Lumm* v. *State*, 3 Porter (Indiana), 393, the application was after an indictment for murder. The relator in his petition admitted the legality of his arrest and detention, but claimed that his offence was less than murder, and bailable. The court on their statutes allowed an examination of witnesses, for the reason that "the indictment is not conclusive of the grade of the offence; the prisoner may be convicted of murder in the first or in the second degree, or of manslaughter." (The last two not capital.) The prosecuting officer very often prefers but one count for murder, when the crime intended to be imputed is murder in the second degree or manslaughter.

After indictment, on *habeas corpus*, the only possible inquiry can be as to the grade of the offence, or the strength of the evidence. It is not a question of guilt or innocence absolutely, for there is no power to discharge. But if on the testimony there is no doubt that a murder has been committed (and no point can therefore arise as to the grade), but the issue is as to the guilty complicity of the relator with the perpetrator—and that issue depends in a great degree on the credibility of witnesses, it would be going very far in the Appellate Court to reverse the judgment of the court, who saw, heard, and observed the witnesses. That, as it seems to us, is the case made by this record of the facts.

In the *case of Wray*, 30 Miss. Rep., 142, and *Beal's case*, 39 Miss. Rep., 720, the court deemed it "proper to withhold the grounds of its opinion, as the cases were to undergo a jury

trial, whose province it was to determine the guilt or innocence of the accused." In these cases the only question that could arise was as to grade of the homicide, or its sufficiency to criminate at all, and we are left to inference as to the opinion of the court on the point. Appreciating the delicacy of arguing on the testimony in advance of the jury trial, to its criminating or exculpatory effect, we have only attempted to deduce from the practice and precedents of the courts the principles of the law on this subject, which have conducted us to the conclusion that, in the circumstances of this case, we ought to affirm the judgment of the circuit judge.

Supreme Court of Tennessee.

JACOB C. SMITH *v.* WILLIAM BRAZELTON.

In an action of trespass, the defendant, under a plea of not guilty, may show that the acts complained of were not unlawful.

In an action of trespass for leading or inducing confederate soldiers to cut down and burn plaintiff's fences, timber, etc., during the late war, the facts that the defendant was a sympathizer with the confederate cause, that he was seen to ride with confederate officers across his own land and point to land of plaintiff, and that timber, etc., was cut by the confederate soldiers off plaintiff's land but not off defendant's, is too uncertain and remote to support a verdict for damages.

It seems that in such a case, the political opinions of the parties may be given in evidence as part of a chain of circumstances tending to show defendant's connection with the trespass.

The late civil war was a *public war* and there was no difference in the rights of the parties; each had all the rights of an independent belligerent.

Among such rights is that of cutting down timber, etc., for the use of the army, and, therefore, the pointing out of another's land or advising the cutting of his timber does not make the party doing so, liable to an action of trespass.

The cases of *Yost* v. *Stout*, 4 Cold., 205; *Davison* v. *Manlove*, 2 Cold., 347; *Wood* v. *Stone*, 2 Cold., 370, and *Wright* v. *Overall*, 2 Cold., 336, overruled or modified.

This was an action of trespass by Brazelton (defendant in error) against Smith. The facts are set forth in the opinion of the court which was delivered by

NELSON, J.—From the evidence in this cause, it appears that the parties were owners of adjoining farms near the town of New Market, in Jefferson county; that in the month of December, 1863, a force of rebel soldiers, under the command of General Vaughn, encamped, for two or three days, and cut timber upon the land of defendant